

Wage and Hour Division, Labor

§ 801.40

maintained. If the records are maintained at a central recordkeeping office, other than in the place or places of business, such records shall be made available within 72 hours following notice from the Secretary or an authorized representative.

(d) All records shall be available for inspection and copying by the Secretary or an authorized representative. Information for which disclosure is restricted under section 9 of the Act and § 801.35 of this part shall be made available to the Secretary or the Secretary's representative where the examinee has designated the Secretary, in writing, to receive such information, or by order of a court of competent jurisdiction.

(Approved by the Office of Management and Budget under control number 1215-0170)

§ 801.35 Disclosure of test information.

Section 9 of the Act prohibits the unauthorized disclosure of any information obtained during a polygraph test by any person, other than the examinee, directly or indirectly, except as follows:

(a) A polygraph examiner or an employer (other than an employer exempt under section 7 (a), (b), or (c) of the Act (described in §§ 801.10 and 801.11 of this part)) may disclose information acquired from a polygraph test only to:

(1) The examinee or an individual specifically designated in writing by the examinee to receive such information;

(2) The employer that requested the polygraph test pursuant to the provisions of this Act (including management personnel of the employer where the disclosure is relevant to the carrying out of their job responsibilities);

(3) Any court, governmental agency, arbitrator, or mediator pursuant to an order from a court of competent jurisdiction requiring the production of such information;

(4) The Secretary of Labor, or the Secretary's representative, when specifically designated in writing by the examinee to receive such information.

(b) An employer may disclose information from the polygraph test at any time to an appropriate governmental agency without the need of a court order where, and only insofar as, the

information disclosed is an admission of criminal conduct.

(c) A polygraph examiner may disclose test charts, without identifying information (but not other examination materials and records), to another examiner(s) for examination and analysis, provided that such disclosure is for the sole purpose of consultation and review of the initial examiner's opinion concerning the indications of truthfulness or deception. Such action would not constitute disclosure under this part provided that the other examiner has no direct or indirect interest in the matter.

Subpart E—Enforcement

§ 801.40 General.

(a) Whenever the Secretary believes that the provisions of the Act or these regulations have been violated, such action shall be taken and such proceedings instituted as deemed appropriate, including the following:

(1) Petitioning any appropriate District Court of the United States for temporary or permanent injunctive relief to restrain violation of the provisions of the Act or this part by any person, and to require compliance with the Act and this part, including such legal or equitable relief incident thereto as may be appropriate, including, but not limited to, employment, reinstatement, promotion, and the payment of lost wages and benefits;

(2) Assessing a civil penalty against any employer who violates any provision of the Act or this part in an amount of not more than \$10,000 for each violation, in accordance with regulations set forth in this part; or

(3) Referring any unpaid civil money penalty which has become a final and unappealable order of the Secretary or a final judgment of a court in favor of the Secretary to the Attorney General for recovery.

(b)(1) Any employer who violates this Act shall be liable to the employee or prospective employee affected by such violation for such legal or equitable relief as may be appropriate, including, but not limited to, employment, reinstatement, promotion, and the payment of lost wages and benefits.

(2) An action under this subsection may be maintained against the employer in any Federal or State court of competent jurisdiction by an employee or prospective employee for or on behalf of such employee, prospective employee and others similarly situated. Such action must be commenced within a period not to exceed 3 years after the date of the alleged violation. The court, in its discretion, may allow reasonable costs (including attorney's fees) to the prevailing party.

(c) The taking of any one of the actions referred to in paragraph (a) of this section shall not be a bar to the concurrent taking of any other appropriate action.

§ 801.41 Representation of the Secretary.

(a) Except as provided in section 518(a) of title 28, U.S. Code, relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under section 6 of the Act, as described in § 801.40 of this part.

(b) The Solicitor of Labor, through authorized representatives, shall represent the Administrator in all administrative hearings under the provisions of section 6 of the Act and this part.

§ 801.42 Civil money penalties—assessment.

(a) A civil money penalty in an amount not to exceed \$10,000 for any violation may be assessed against any employer for:

(1) Requiring, requesting, suggesting or causing an employee or prospective employee to take a lie detector test or using, accepting, referring to or inquiring about the results of any lie detector test of any employee or prospective employee, other than as provided in the Act or this part;

(2) Taking an adverse action or discriminating in any manner against any employee or prospective employee on the basis of the employee's or prospective employee's refusal to take a lie detector test, other than as provided in the Act or this part;

(3) Discriminating or retaliating against an employee or prospective em-

ployee for the exercise of any rights under the Act;

(4) Disclosing information obtained during a polygraph test, except as authorized by the Act or this part;

(5) Failing to maintain the records required by the Act or this part;

(6) Resisting, opposing, impeding, intimidating, or interfering with an official of the Department of Labor during the performance of an investigation, inspection, or other law enforcement function under the Act or this part; or

(7) Violating any other provision of the Act or this part.

(b) In determining the amount of penalty to be assessed for any violation of the Act or this part, the Administrator will consider the previous record of the employer in terms of compliance with the Act and regulations, the gravity of the violations, and other pertinent factors. The matters which may be considered include, but are not limited to, the following:

(1) Previous history of investigation(s) or violation(s) of the Act or this part;

(2) The number of employees or prospective employees affected by the violation or violations;

(3) The seriousness of the violation or violations;

(4) Efforts made in good faith to comply with the provisions of the Act and this part;

(5) If the violations resulted from the actions or inactions of an examiner, the steps taken by the employer to ensure the examiner complied with the Act and the regulations in this part, and the extent to which the employer could reasonably have foreseen the examiner's actions or inactions;

(6) The explanation of the employer, including whether the violations were the result of a bona fide dispute of doubtful legal certainty;

(7) The extent to which the employee(s) or prospective employee(s) suffered loss or damage;

(8) Commitment to future compliance, taking into account the public interest and whether the employer has previously violated the provisions of the Act or this part.

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